

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SALEM HOSPITAL CORPORATION
a/k/a THE MEMORIAL HOSPITAL OF
SALEM COUNTY

and

HEALTH PROFESSIONALS AND
ALLIED EMPLOYEES (HPAE)

Cases 4-CA-073452
4-CA-073457
4-CA-073463
4-CA-073474¹

Noelle Reese, Esq.,
for the General Counsel.
John Jay Matchulat, Esq. (Brentwood, Tennessee),
for the Respondent.
Lisa Leshinski, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania on August 1, 2012. The Union, Health Professionals and Allied Employees (HPAE), filed the charges in this matter on January 31, 2012. The General Counsel issued the complaint on April 26, 2012.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the General Counsel,² I make the following

¹ Only the issues raised in charge 4-CA-073474 were litigated. The other charges were settled and/or withdrawn.

² The Union has informed me that it is not filing a brief. The briefs were due on September 12. Rule 102.42 of the Board's Rules allows for post-trial briefs no more than 35 days after the close of hearing. However, extensions of time are often granted beyond 35 days. On August 16, 2012, the General Counsel requested a one-week extension of time to file briefs from September 5 to September 12. This request was granted on August 16. On September 5, Respondent requested an additional extension to September 24. This request was denied. The 42 days allowed for the filing of post-trial briefs in this case, a one-day hearing with 107 pages of transcript, and relatively few exhibits, was more than adequate. This is particularly true given the nature of the issues. Nonetheless, I informed Respondent that I would accept its brief if filed on September 13. As of 9:25 a.m. September 14, I had not received Respondent's brief.

FINDINGS OF FACT

I. JURISDICTION

Respondent, Salem Hospital Corporation, operates an acute care hospital in Salem, New Jersey where it annually receives gross revenues in excess of \$250,000 and purchases and receives goods valued in excess of \$50,000 directly from locations outside of New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

The Union won a representation election conducted at the Salem Hospital on September 1 and 2, 2010. Respondent then filed objections to the conduct of the election. The Board rejected these objections and on August 3, 2011, certified the Union as the exclusive bargaining representative of Respondent's employees in a unit consisting of all full-time and regular part-time and per diem Registered Nurses, including Staff Nurses, Case Managers, and Charge Nurses at that facility.

The Union requested bargaining soon after it was certified. On August 17, 2011, Respondent's President informed the Union that it would continue to contest the certification and would not meet and bargain with it. The Union filed an unfair labor practice charge with regard to this refusal. The General Counsel issued a complaint and on November 28, 2011, the Board found that Respondent was violating the Act in refusing to meet and bargain with the Union, 357 NLRB No. 119 (2011). On August 15, the Union requested that Respondent provide it with information regarding unit members' wages, benefits and related matters. Respondent ignored this request. The Board also found that Respondent violated the Act in failing to provide this information, 358 NLRB No. 95 (July 31, 2012).

The instant case

This case involves allegations that Respondent violated Section 8(a)(5) and (1) by refusing and failing to bargain over all disciplinary actions taken against unit employees and ignoring a second Union information request. The Union sent Respondent a letter on October 20, 2011 which demanded bargaining over any and all disciplinary measures taken against unit employees, including terminations. The Union also requested:

1. The name, department, and hire date of all employees who were disciplined since the Union was certified on August 3, 2011 to date.

2. For each employee disciplined or terminated:

a. A copy of the disciplinary form given to each employee;

b. Personnel files of [disciplined] employees, including evaluations for the previous three years;

5 c. A. summary of any witnesses statements considered in imposing discipline.

d. Copies of all documents, policies and procedures used in order to base the discipline.

10 e. List of witnesses.

Finally, the letter stated that this was an ongoing request for such documents for discipline imposed in the future, and an ongoing demand to bargain.

15 Salem Hospital did not respond to the October 20, 2011 request. The record establishes that Respondent has a great deal of information responsive to the Union's request. For example, it took 50 disciplinary actions against unit nurses in the period January 1 – July 31, 2012. This represents a marked increase in the number of disciplinary measures taken against unit members compared with 2010 and 2011, Er. Exh. 10.

20 *Analysis*

25 Section 8(a)(5) provides that it is an unfair labor practice for an employer to refuse to bargain with the representative of its employees. Unit employee discipline is a mandatory subject of bargaining. An employer which refuses to meet and bargain with a certified collective bargaining representative concerning the discipline of unit employees violates Section 8(a)(5) and (1) of the Act, *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991).

30 An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative for contract negotiations or administration, *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956). Information pertaining to employees in the bargaining unit is presumptively relevant, *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). More specifically, information regarding the discipline of unit employees is presumptively relevant, *Leland Stanford Junior University*, 307 NLRB 75 (1992). An employer must respond to an information request in a timely manner. An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all, *American Signature Inc.*, 334 NLRB 880, 885 (2001).³

40 If an employer has a claim that some of the information requested is confidential or unduly burdensome to produce, such claims must be made in a timely fashion, *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995). The reason a confidentiality claim must be timely raised is so that the parties can attempt to seek an accommodation of the employer's confidentiality concerns, *Tritac Corp.*, 286 NLRB 522 (1987).⁴ The same is true with respect to

³ This case has also been cited under the name of *Amersig Graphics, Inc.*

⁴ When responding to a request for the identity of witnesses to an incident resulting in discipline or a summary of their statements, an employer must, as in the case of medical information, raise its defenses

a claim that satisfying the request would be unduly burdensome, *Honda of Hollywood*, 314 NLRB 443, 450-51 (1994); *Pet Dairy*, 345 NLRB 1222, 1223 (2005)⁵.

The fact that a union may ask an employer for a large volume of information does not, by itself, render that request “overbroad” so as to relieve the employer from the duty to provide that information where, as here, the information is relevant and necessary to the union's performance of its bargaining duties. If an employer declines to supply relevant information on the grounds that it would be unduly burdensome to do so, the employer must not only timely raise this objection with the union, but also must substantiate its defense. Respondent has done neither. Respondent never advised the union that its request was unduly burdensome, and never sought clarification from the union in order to narrow the request, *Pulaski Construction Co.*, 345 NLRB 931, 937 (2005). There is no doubt that production of the information may impose strains on an employer, but that consideration does not outweigh the union's right to the information requested. *H.J. Scheirich Co.*, 300 NLRB 687, 689 (1990).

Respondent contends that it was prohibited from disclosing some of the information requested by the Union due to the privacy provisions of HIPAA (the Health Insurance Portability and Accountability Act). However, the Department of Health and Human Services has interpreted these requirements to allow disclosure, without prior authorization, of information which is required to be disclosed by law, such as pursuant to the National Labor Relations Act, 65 Fed. Reg. 82485 (December 28, 2000) [preamble to the final rule to protect the privacy of individually identifiable health information]. More specifically, the Department, in responding to public comments stated:

The final rule does not prohibit disclosures that covered entities must make pursuant to other laws. To the extent a covered entity is required by law to disclose protected information to collective bargaining representatives under the NLRA, it may do so without an authorization. Also, the definition of “health care operations” at Section 164.501 permits disclosures to employee representatives for purposes of grievance resolution. *Id.*, at page 82598.⁶

The record herein demonstrates why an employer is required to seek an accommodation with the Union. Respondent introduced an exhibit with some, but possibly not all, individually identifiable patient information redacted, Er. Exh. 9.. Thus, it demonstrated at trial that much of the information for which it claims confidentiality could have been produced pursuant to an accommodation with the Union. In many cases, one would expect the Union to agree to the redaction of Social Security Numbers and to some information which would tend to identify patients. However, there are certainly cases in which some individually identifiable health information, including in some cases the patient's identity, may have to be disclosed when the Union's need for that information outweighs the patient's privacy concerns. One example might

regarding confidentiality in a timely fashion and must seek an accommodation with the Union regarding these concerns, *Pennsylvania Power Co.*, 301 NLRB 1104 (1991).

⁵ Also cited as *Land-O-Sun Dairies*.

⁶ Also see 45 CFR sections 164.506(c)(1); 164.501(6).

be a situation in which a nurse is disciplined for his or her treatment of a particular patient and/or a situation in which the discipline is predicated in part on the patient's account of the nurse's care.

The record also demonstrates this principle with regard to those documents Respondent claims would have been unduly burdensome to produce. Had Respondent offered the Union selected portions of the discriminatees' personnel files, possibly with redactions, the Union may have agreed to at least some of Respondent's proposals. The testimony of Respondent's human resources director, Linda Tuting, at transcript page 74, indicates that there is a lot of information in the personnel files that would be of no interest to the Union.

If an employer refuses to bargain, while contesting the validity of a Board determination that a Union is the certified bargaining representative, it does so at its peril. Should the certification be upheld, an employer's refusal to bargain, implementation of unilateral changes and refusal to provide the Union with relevant information violate Section 8(a)(5), *Quaker Tool & Die, Inc.*, 169 NLRB 1148 (1968); *San Miguel Hospital Corp. d/b/a Alta Vista Regional Hospital*, 357 NLRB No.36, slip op. at 2 (2011).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Respondent, Salem Hospital Corporation, a/k/a Memorial Hospital of Salem, County, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide information to the Union that is relevant and necessary to its role as the exclusive bargaining representation of all full-time and regular part-time and per diem Registered Nurses, including Staff Nurses, Case Managers, and Charge Nurses employed by the Respondent at the Memorial Hospital of Salem County, New Jersey.

(b) Failing and refusing to bargain with the Union concerning discipline taken with regard to bargaining unit employees.

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish the Union with all the information it requested in its October 20, 2011, unless the Respondent can establish that it has a confidentiality concern that outweighs the Union's interest in obtaining such information -- after the Respondent has offered the Union a reasonable accommodation that meets the Union's needs;⁸

(b) Bargain with the Union regarding any and all disciplinary measures taken against bargaining unit employees since September 2, 2010.⁹

(c) Within 14 days after service by the Region, post at its Salem, New Jersey facility copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 2, 2010.

⁸ I agree with the observations of Judge David Goldman in *NHS Human Services, Inc. of Allegheny and Westmoreland*, Case No. 6-CA-37002 (J.D. May 12, 2012) to wit: 1) If the confidentiality interest herein was Respondent's own, I'd be inclined to find that Respondent waived its defense. However, the confidentiality interest herein may be that of third parties, i.e., other nurses and patients. 2) Accommodations need not be limited to redactions, they can also include limitations as to who can view certain documents, how they would be used and provisions regarding document disposal, destruction or return after the Union's need for the document has ceased.

⁹ Where an employer's objections to the election have been rejected, its bargaining obligation commences as of the date of the election, *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974).

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

5 Dated, Washington, D.C., September 14, 2012.

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Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the Union, Health Professionals and Allied Employees (HPAE), by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective bargaining representative of our employees in the following bargaining unit:

All full-time and regular part-time and per diem Registered Nurses, including Staff Nurses, Case Managers, and Charge Nurses employed by us at the Memorial Hospital of Salem County located at Woodstown Road, Salem New Jersey, excluding all other employees, managers, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain with the Union over the discipline of unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL furnish the Union with the information it requested on October 20, 2011.

WE WILL meet and bargain with the Union concerning any disciplinary actions taken since the representation election of September 1-2, 2010, and any disciplinary actions taken in the future against any bargaining unit employee.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, 7th Floor, Philadelphia, PA 19106-4404

(215) 597-7601, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-5354.